UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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VICKI WEST and WENDY FAGUNDES, individually and on behalf of others similarly situated,

Plaintiffs,

v.

CIRCLE K STORES, INC.,

Defendant.

NO. CIV. S-04-0438 WBS GGH

MEMORANDUM AND ORDER RE: PRELIMINARY MOTION TO APPROVE CLASS ACTION SETTLEMENT

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Plaintiffs Vicki West and Wendy Fagundes[1] seek to bring a class action suit against defendant Circle K Stores, Inc. for alleged violations of the California Labor Code, Cal. Lab. Code §§ 226.7, 227.3, and California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200-17210. Presently before the court is plaintiffs' motion for preliminary approval of settlement with defendants. For the following reasons,

[1] In their brief in support of their motion to certify the class, plaintiffs corrected the spelling of "Fagundes", which had previously been spelled "Fegundes."

plaintiffs' motion is granted.

I. Factual and Procedural Background

On March 3, 2004, plaintiffs filed a class action complaint claiming that defendant failed to pay (1) overtime wages, (2) administrative leave wages, and (3) accrued but unused vacation wages, all in violation of state law. (Compl. ¶ 17.) On July 15, 2005, this court granted in part plaintiffs' motion to amend their complaint. (July 15, 2005 Order at 2-3.) The amendments dropped some of the claims of one proposed subclass (managers) and added Wendy Fagundes as a named plaintiff, representing an additional class of employees claiming that defendant failed to pay meal and break wages. (Id. at 3-4.)

On March 20, 2004, plaintiffs moved to certify two distinct classes based on their remaining claims: (1) a "meal period class" defined as "all hourly store employees employed by defendant in California since October 1, 2000, who did not receive off-duty meal periods" and (2) a "vacation class" defined as "all employees employed in California by defendant at any time since March 3, 2000, who forfeited accrued but unused vacation under defendant's vacation policy." (Pl.'s Mot. for Class Cert. 1.) However, before the court could hear that motion, the parties attended a day long mediation with Justice Richard Neal (retired) where they agreed to settlement terms. Accordingly, the parties now seek preliminary approval of their Joint Stipulation of Settlement and Release.

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II. Discussion

A. Legal Standard

The Ninth Circuit has declared that a strong judicial policy favors settlement of class actions. Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992). Nevertheless, where, as here, "parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." Staton v. Boeing Co., 327 F.3d 938, 952 (9th Cir. 2003). In conducting the first inquiry, the court "must pay 'undiluted, even heightened, attention' to class certification requirements" because, unlike in a fully litigated class action suit, the court will not have future opportunities "to adjust the class, informed by the proceedings as they unfold." Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 620 (1997); Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998) (quoting Amchem, 521 U.S. at 620). "[T]he parties can[not] agree to certify a class that clearly leaves any one requirement unfulfilled" and consequently, the court cannot blindly rely on the fact that the parties have stipulated that a class exists for purposes of settlement. Berry v. Baca, No. CV 01-02069, 2005 WL 1030248, at *7 (C.D. Cal. May 2, 2005); see also Amchem, 521 U.S. at 622 (observing that nowhere does Rule 23 say that certification is proper simply because the settlement is fair). In the second part of its inquiry, the "'court must carefully consider "whether a proposed settlement is fundamentally fair, adequate, and reasonable,' recognizing that '[i]t is the settlement taken as a whole, rather than the

individual component parts, that must be examined for overall fairness . . . .'" Staton, 327 F.3d at 952 (quoting Hanlon, 150 F.3d at 1026); see also Fed. R. Civ. P. 23(e).

Additionally, approval of a class action settlement takes place in two stages. See In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 227 F.R.D. 553, 556 (W.D. Wash. 2004) (noting that in the first stage of the approval process "the court preliminarily approve[s] the Settlement pending a fairness hearing, temporarily certifie[s] the Class . . . , and authorize[s] notice to be given to the Class"). Accordingly, in this first order the court will only "determine[] whether a proposed class action settlement deserves preliminary approval" and lay the ground work for a future fairness hearing (see schedule below). Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 525 (C.D. Cal. 2004). At that subsequent hearing, after notice is given to class members, the court will entertain any objections by putative class members to (1) the treatment of this litigation as a class action and/or (2) the terms of the settlement. Diaz v. Trust Territory of Pac. Islands, 876 F.2d 1401, 1408 (9th Cir. 1989) (holding that prior to approving the dismissal or compromise of claims containing class allegations, district courts must, pursuant to Rule 23(e), hold a hearing to "inquire into the terms and circumstances of any dismissal or compromise to ensure that it is not collusive or prejudicial").[2] Following that fairness hearing, the court will

[2] Part of the reasoning in Diaz appears to have been overruled by the Supreme Court in Amchem. Namely, Diaz assumed that a court could approve settlement without certifying the

make a final determination as to whether the parties should be allowed to settle a class action pursuant to the terms agreed upon. DIRECTV, Inc., 221 F.R.D. at 525.

B. Certification of the Class

A class action must meet four prerequisites identified in Federal Rule of Civil Procedure 23(a), in addition to meeting the requirements of at least one of the three subdivisions of Federal Rule of Civil Procedure 23(b). See Fed. R. Civ. P. 23(a), (b). Additionally, although a district court has discretion in determining whether the moving party has satisfied each Rule 23 requirement, see Califano v. Yamasaki, 442 U.S. 682, 701 (1979); Montgomery v. Rumsfelo, 572 F.2d 250, 255 (9th Cir. 1978), the court must conduct a rigorous inquiry before certifying a class, see Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982); E. Tex. Motor Freight Sys. v. Rodriquez, 431 U.S. 395, 403-05 (1977). As noted above, although the parties have stipulated that a class exists for purposes of settlement, this does not relieve the court of its duty to conduct this inquiry.

Typically, when parties settle before the class is certified, the court is denied adversarial briefs on the class certification issue. However, in this case the court is in a unique position, as the parties have already fully briefed a motion for class certification. Although defendant now agrees, at least for the purposes of settlement, that class treatment is

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class. See Diaz, 876 F.2d at 1408 ("Before certification, the dismissal is not res judicata against the absent class members and the court does not need to perform the kind of substantive oversight required when reviewing a settlement binding upon the class."). As the discussion above illustrates, however, this reasoning is incompatible with the Court's holding in Amchem.

appropriate, it composed a lengthy brief in opposition to plaintiffs' motion for certification. The court will therefore consider several of defendant's original arguments in deciding whether the issues in this case should be treated as class claims pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(3).

1. Rule 23(a)

Rule 23(a) restricts class actions to cases where:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). These requirements are more commonly referred to as numerosity, commonality, typicality, and adequacy of representation. See Fed. R. Civ. P. 23(a); Hanlon, 150 F.3d at 1019.

a. Numerosity

Courts have not established a precise threshold for determining numerosity. See Gen. Tel. Co. v. E.E.O.C., 446 U.S. 318, 330 (1980). However, a class consisting of one thousand members "clearly satisfies the numerosity requirement." Sullivan v. Chase Inv. Servs., Inc., 79 F.R.D. 246, 257 (N.D. Cal. 1978). To evidence the vacation class size, plaintiffs offer excerpts from the depositions of Linda Prince and Robert Crandall, which support their claim that 1,752 employees forfeited accrued but unused vacation during the class period. (Mar. 20, 2006 Jones Decl. Ex. C (Prince Dep. 10:9-17); Ex. E (Crandall Dep. 55:13-57:2).) However, before defendant agreed to settle, it contended that this figure is not accurate because it includes employees

who were not actually terminated, but rather were transferred to defendant's affiliated company (ConocoPhillips) following a sale of defendant's stock. While this may be true, in order to eliminate this segment of the vacation class, the court would have to consider the merits of the parties' legal arguments, which it cannot do at the class certification stage.[3] See Blackie v. Barrack, 524 F.2d 891, 901 n.17 (9th Cir. 1975) (acknowledging that in accepting allegations regarding class size, the resulting class order may be "speculative in the sense that the plaintiff may be altogether unable to prove his allegations"). Therefore, accepting plaintiffs' alleged class size as true, and recognizing that the joinder of 1,752 plaintiffs would be impracticable, the court holds that the numerosity requirement is satisfied as to the vacation class.

Likewise, numerosity is also satisfied for the meal period class--a fact that defendant has never disputed. Since March 3, 2000, defendant has employed up to 14,000 hourly employees who might have claims for wrongfully withheld meal breaks. (Rodriguez Decl. ¶ 1.) Again, although courts have not established a precise number for the numerosity requirement,

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[3] In contesting the number of putative vacation class members, defendant originally argued that the law would not support plaintiff's claims. Namely, defendant contended that, under California law, forfeiture cannot occur absent a termination of employment and that a change in ownership does not effectively amount to termination. As noted above, these arguments speak directly to the merits of plaintiffs' claims. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." (quoting Miller v. Mackey Int'l, 452 F.2d 424, 427 (5th Cir. 1971))).

joinder of 14,000 people in a single case would clearly be impracticable.

b. Commonality

Rule 23(a) also requires that "questions of law or fact [be] common to the class." Fed. R. Civ. P. 23(a)(2). The Ninth Circuit construes commonality liberally. See Hanlon, 150 F.3d at 1019. It is not necessary that all questions of law and fact be common. "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Id.

Here, a significant common question exists as to whether the defendant, by policy or practice, failed to carry over accrued but unused vacation time from year to year on behalf of the class members. Had this case gone to trial, additional common legal issues would have included: 1) whether termination is necessary before the forfeiture of accrued but unused vacation time is unlawful; 2) whether, under California Labor Code § 227.3, transfer of ownership constitutes a termination of the employee relationship, requiring payment of all accrued but unused vacation; and 3) whether the defendant's policy or practice of manually carrying over accrued but unused vacation time only upon request violates California Labor Code § 227.3 as a "use it or lose it policy." Such commonality among the class members, in issues of both law and fact, is sufficient to meet requisites of Rule 23(a)(2).

Commonality with respect to the meal period class presents a closer question. The purpose of this class is to

recover additional pay allegedly owed for missed meal breaks in violation of California Labor Code § 226.7. Cal. Lab. Code § 226.7(b) (requiring employers to pay employees "one additional hour of pay at the employee's regular rate of compensation for each work day that [a] meal or rest period[, as required by subsection a,] is not provided"). However, the California Code of Regulations further provides that "[a]n 'on duty' meal period [is acceptable] when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement [must] state that the employee may, in writing, revoke the agreement at any time." Cal. Code Regs. tit. 8, § 11070(11)(C).

At all times during the proposed the class period, defendant required employees to sign some form of "meal period agreement" (or waiver) that included the nature of the work exception. Nevertheless, defendant originally argued that evaluating the enforceability of the waiver would require an individual inquiry into the nature of each employee's work on every shift where that employee missed a meal break. Depending on the traffic in a given store on a given shift, defendant argued, the nature of the work may have precluded an off-duty meal break, and these individual inquiries defeat commonality.

However, this argument would again involve the court in a determination of the merits of the case. The parties have not provided the court with any authority establishing that the nature of the work exception applies on a case-by-case, shift-by-shift basis. Indeed, such a rule would potentially eviscerate

the protections provided by California Labor Code § 226.7, as every employer would defend against a claim of missed meal periods by arguing that, because of the nature of the employee's work on that day, he was too busy to take a break. Instead, the exception was more likely provided to allow employers some relief when the nature of the work in their business overall does not permit a mid-shift meal break. Significantly, the court is also not aware of any authority establishing that the nature of the work in a convenience store qualifies for the § 11070(11)(c) exception. Consequently, because the court cannot resolve this question without considering the merits of the case, the court must recognize that a potential and significant common question exists for the meal class.

c. Typicality

Rule 23(a) further requires that the "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality requires that named plaintiffs have claims "reasonably coextensive with those of absent class members," but their claims do not have to be "substantially identical." Hanlon, 150 F.3d at 1020. The test for typicality "is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (quoting Schwartz v. Harp, 108 F.R.D. 279, 282 (C.D. Cal. 1985)).

In this case, all putative vacation class members suffered the same injury when their accrued but unused vacation

time was forfeited without compensation. The source of this injury arises from a similar policy or practice instituted by the defendant regarding the forfeiture of accrued but unused vacation.[4] Moreover, there is no indication of uniqueness as to either defendant's conduct toward the named plaintiff or the injury suffered as a result of that conduct (allegedly, lost vacation time). Therefore, the requirement of typicality has been met.

The analysis is again somewhat more strained with respect to the meal period class. Defendant originally challenged recognition of Fagundes as the class representative because as a supervisor and a long term employee (nearly 11 years) in a business with nearly 100% turnover, her claims are arguably not typical. In particular, Fagundes, who signed an outdated meal period agreement, has additional grounds on which to challenge defendant's practices because her agreement lacks the "revokable at will clause" that is presently required by Cal. Code Regs. tit. 8, § 11070(11)(C).

Nevertheless, "[w]hen the same unlawful conduct was directed at or affected both the named plaintiffs and the members

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[4] In opposing class certification prior to settlement, defendant originally argued that typicality is frustrated by the existence of four vacation policies encompassed by the class definition. (Def.'s Opp'n to Mot. for Class Cert. 35-36.) Specifically, defendant pointed out that two distinct vacation policies apply to store managers and two distinct vacation policies apply to store level employees. (Farthing Decl. ¶¶ 6-7.) However, a brief review of the policies suggests, at least as to the forfeiture or carrying over of accrued vacation time, that any differences among the policies are insignificant. (Compare Farthing Decl. Ex. A (Section V), with Farthing Decl. Ex. B (Section V) and Farthing Decl. Ex. C (Section V).) Distinctions regarding how vacation was accrued, and how much time an employee could store up, have no bearing on the typicality inquiry here.

of the putative class, the typicality requirement is usually met, irrespective of varying fact patterns that underlie individual claims." Stephenson v. Bell Atl. Corp., 177 F.R.D. 279, 285 (D.N.J. 1997) (citing Baby Neal v. Casey, 43 F.3d 48, 58 (3d Cir. 1994); Herbert Newberg & Alba Conte, Newberg on Class Actions § 3.13, at 3-76, 3-77 (3d ed. 1992)). Here, like those that served under her, Fagundes allegedly was improperly denied earned meal breaks in violation of Cal. Lab. Code § 226.7. Although she has an additional ground on which to attack defendant's policy, the court cannot say with certainty that this argument would succeed and that plaintiff would thus not need to "prove what others in the class must establish." Greeley v. KLM Royal Dutch Airlines, 85 F.R.D. 697, 701 (S.D.N.Y. 1980). This is not a case where the proposed class representative's legal arguments are completely distinct from those of an identifiable subset of the class. Rather, Fagundes' legal arguments are coextensive with those of the class she proposes to represent. Therefore plaintiffs can satisfy the typicality requirement for the meal period class.

d. Adequacy of Representation

Finally, rule 23(a) requires representative parties who "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4); see Hanlon, 150 F.3d at 1020. To resolve the question of legal adequacy, the court must answer two questions: (1) do the named plaintiff and her counsel have any conflicts of interest with other class members and (2) will the named plaintiff and her counsel vigorously prosecute the action on behalf of the class? Hanlon, 150 F.3d at 1020.

Defendant initially contended that the named

plaintiff's duty to ensure some of the putative class members took their vacation days, while a supervisor in defendant's employ, represents a conflict of interest with non-supervisor class members. However, in those circumstances where a conflict of interest might exist, such a conflict will only bar certification when "the conflict is serious and irreconcilable." Mateo v. M/S Kiso, 805 F. Supp. 761, 772 (N.D. Cal 1992); see also O'Connor v. Boeing N. Am., Inc., 184 F.R.D. 311, 335 (C.D. Cal. 1998) ("[O]nly a conflict that goes to the very subject matter of litigation will defeat a party's claim of representative status." (quoting 10B Charles Alan Wright et al., Federal Practice and Procedure § 1768, at 327-28 (3d ed. 1998))). Here, the possible conflict of interest must implicate the forfeiture of vacation time, and it does not. Instead, the named plaintiff's alleged duty pertained to the accrual and use of vacation time, a subject not in dispute.

Further, the fact that plaintiff's employment with defendant ended in 2003 has no bearing on her adequacy as a class representative. To prove the elements associated with her forfeiture of accrued vacation time claim, West must necessarily engage in a course of litigation that will prove the elements of injury as to the entire class, including those members who were injured in 2004 and beyond. Significantly, defendant has not argued that it changed its policy or practice with respect to the forfeiture and carrying over of vacation during the time subsequent to the named plaintiff's termination.

Additionally, West has shown that her counsel is adequately experienced in class actions. (See Mar. 20, 2006

Jones Decl. ¶ 4.) As such, the court can safely assume that her counsel has vigorously sought to maximize the return on its labor and to vindicate the injuries visited on the entire class. Therefore, the court holds that West is an adequate class representative.

Likewise, Fagundes does not have substantive conflicts with the proposed meal period class and therefore is an adequate representative for this group. Although in theory, as a supervisor in charge of scheduling meal breaks, Fagundes could be partially responsible for failing to provide meal breaks, the court is not aware of any source for such personal liability on the part of the employee with respect to Cal. Lab. Code § 226.7.[5] Cf. Cicairos v. Summit Logistics, Inc., 133 Cal. App. 4th 949, 962-63 (2005) (holding that an employer's "obligation to provide the plaintiffs with an adequate meal period is not satisfied by [shifting responsibility to employees to take their meal breaks], because employers have 'an affirmative obligation to ensure that workers are actually relieved of all duty.'" (quoting Wage Order applicable to the transportation industry)). Significantly, plaintiff acted in accordance with defendant's well established policies that left little room for discretion. (See, e.g., Mar. 20, 2006 Jones Decl. Ex. B (Farthing Dep. 90:20-91:14 (describing defendant's meal break policy and noting that employees could take an off-duty meal break only after January, 2003 and only if

[5] Moreover, to permit employers to hold supervisors responsible for not taking their own meal breaks simply because of the position they hold, as defendant originally argued, would effectively deny supervisors the protections afforded by § 226.7. The court has not been advised of any authority suggesting that the law should be applied in this way.

"there were two or more employees working and the nature of the business allowed" (emphasis added)).) The claims of her fellow class members will not be that she denied them their meal breaks, but rather that their breaks were denied pursuant to defendant's policies. These facts distinguish this case from the discrimination cases originally relied on by defendant, where supervisors were held to be inadequate representatives because they played a part in discriminatory practices that could be attributed to their employer. See Wagner v. Taylor, 836 F.2d 578 (D.C. Cir. 1987); Donaldson v. Microsoft Corp., 205 F.R.D. 558 (W.D. Wash. 2001).

Moreover, as noted by defendants, the Ninth Circuit has declined to adopt a per se rule prohibiting the representation of a subset of non-supervisory employees by supervisory employees. "[W]hether employees at different levels of the internal hierarchy have potentially conflicting interests is context-specific and depends upon the particular claims alleged in a case." Staton, 327 F.3d at 958. As with typicality, the question boils down to whether the supervisor's claims are coextensive with those of the non-supervisory employees. Id. Because the court has already made this determination in favor of plaintiffs, Fagundes can adequately represent the meal period class.

2. Rule 23(b)

An action that meets all the prerequisites of Rule 23(a) may be maintained as a class action only if it also meets the requirements of one of the three subdivisions of Rule 23(b). See Eisen, 417 U.S. at 163. In this case, plaintiff seeks

certification of two independently represented classes under Rule 23(b)(3), "which is appropriate 'whenever the actual interests of the parties can be served best by settling their differences in a single action.'" Hanlon, 150 F.3d at 1022 (quoting 7A Charles Alan Wright, et al., Federal Practice and Procedure § 1777 (2d ed. 1986)). A class action may be maintained under Rule 23(b)(3) if (1) "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting individuals members," and (2) "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

a. Predominance

Because the Rule 23(a)(3) already considers commonality, the focus of the Rule 23(b)(3) predominance inquiry is on the balance between individual and common issues. Hanlon, 150 F.3d at 1022. Here, defendant originally contended that differences among the class members in vacation accrual caps, vacation accrual rates, and the ability to take vacation days raise individual issues that predominate any common legal or factual issues. (Def.'s Opp'n to Class Cert. 37-39.) However, differences in accrual caps and rates are quantitative measures that are irrelevant to the appropriate overarching liability question: whether the defendant's employment agreements amount "to an impermissible 'use or lose it' policy or a valid 'no additional accrual' policy" under California Labor Code § 227.3. Boothby v. Atlas Mech., Inc., 6 Cal. App. 4th 1595, 1603 (1992); Cal. Labor Code § 227.3. Because of the uniform language among the several vacation policies, and the alleged uniform

implementation of these policies, common issues of law and fact would predominate if this case were to go to trial.[6] (See Farthing Decl. Exs. A-C.) Importantly, individual differences in accrual caps, accrual rates, and amount of vacation time accrued would have pertained to damages only and individual issues regarding damages will not, by themselves, defeat certification under Rule 23(b)(3). See Blackie, 524 F.2d at 905-09 ("Courts have generally declined to consider conflicts, particularly as they regard to damages, sufficient to defeat class action status at the outset unless the conflict is apparent, imminent, and on an issue at the very heart of the suit.").

Likewise, assuming, as the court has, that the nature of the work exception is intended to apply to the nature of the work in general and not the circumstances on any given shift, common claims would have predominated in the meal period class action as well. Individual matters, such as whether a putative class member worked long enough to qualify for a meal break and whether she was permitted to take the earned break, as in the vacation class, would relate only to damages. The predominant issue, and one appropriate for class treatment, is whether defendant's policies, which routinely resulted in employees having to take on-duty meal "breaks," were lawful.

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[6] In their reply to the defendant's opposition to certification, plaintiffs abandoned their assertion that defendant's vacation policies were "unfair and unreasonable because workloads and chronic understaffing precluded employees from taking vacation." (Pl.'s Reply to Def.'s Opp'n to Class Cert. 24.) Therefore, to the extent that this argument raised individual issues, that concern is no longer relevant.

b. Superiority

In addition to the predominance requirement, Rule 23(b)(3) provides a non-exhaustive list of matters pertinent to the court's determination that the class action device is superior to other methods of adjudication. See Fed. R. Civ. P. 23(b)(3)(A)-(D). These matters include:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
> (D) the difficulties likely to be encountered in the management of a class action.

Id. Some of these factors, namely (D) and perhaps (C), are irrelevant if the parties have agreed to a pre-certification settlement. Amchem, 521 U.S. at 620. Additionally, the court is unaware of any concurrent litigation regarding the issues of the instant case. In the absence of competing lawsuits, it is also unlikely that other individuals have an interest in controlling the prosecution of this action or other actions, although objectors at the fairness hearing may reveal otherwise. As it stands today however, the class action device appears to be the superior method for adjudicating this controversy. As such, the vacation class is properly maintained under Rule 23(b)(3).

The superiority consideration also favors certification of the meal period class, despite the availability of an informal wage claim processing service provided by the Division of Labor Standards Enforcement ("DLSE") (especially in light of the fact that the parties have settled the case). The administrative

hearing option (a "Berman hearing") described by defendant in its opposition to class certification "is conducted 'in an informal setting preserving the right[s] of the parties' and 'is designed to provide a speedy, informal, and affordable method of resolving wage claims.'" Lolley v. Campbell, 28 Cal. 4th 367, 372 (2002) (quoting Cal. Lab. Code § 98(a) and Cuadra v. Millan, 17 Cal. 4th 855, 858 (1998)). Claimants need only submit a form to initiate the process. Cal. Lab. Code § 98(a). However, the procedure is not necessarily as quick and easy as defendants describe it. Notably, successful claimants will need to participate in a hearing or mediation where their employer will undoubtedly be represented by counsel. Id. Additionally, the Commissioner has discretion to delay a proceeding and there is an appeals process that might further delay recovery. Id.; Cal. Lab. Code § 98.2 (requiring that appeals be taken to a California Superior Court).

While these procedures might nevertheless be preferable to a protracted class litigation, in light of the fact that the parties here have proposed a settlement procedure that will allow for virtually dispute-free claims to be processed in a matter of months with minimal involvement on the part of the claimant or the government, permitting the parties to proceed with class certification and settlement seems to be the superior approach. Additionally, the fact that claimants/class members might not be able to recover the exact number of meal breaks missed and will sacrifice some of their recovery to attorneys' fees must be weighed against the fact that the settlement reaches back farther than the DLSE proceedings would permit. Given these circumstances, a meal period class action presents a superior

method for pursuing the claims at issue here and certification is proper under Rule 23(b)(3).

C. Fairness, Adequacy, and Reasonableness of Proposed Settlement

Having determined that class treatment appears to be warranted,[7] the court must now address whether the terms of the parties' settlement are fair, adequate, and reasonable. In conducting this analysis, the court must balance several factors including:

> the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Hanlon, 150 F.3d at 1026. But see Molski v. Gleich, 318 F.3d 937, 953-54 (9th Cir. 2003) (noting that a district court need

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[7] The court notes that it has conducted a full analysis of the class certification question at this stage to determine early on if all of the effort that will necessarily go into preparing for the fairness hearing is appropriate. This initial determination that class certification is warranted is not, however, binding on the court and the parties are discouraged from changing their positions on the terms of the settlement in reliance on this order. The court is not required to make a final determination that class treatment is appropriate until the final settlement approval, and it therefore does not herein make that final determination. See In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 797 (3d Cir. 1995) (holding that while the trustworthiness of the negotiation process used to approve the settlement can be relied on to justify provisional certification of a settlement class, "final settlement approval depends on the finding that the class met all the requisites of Rule 23"). Moreover, because the analysis of the superiority component of the Rule 23(b)(3) requirements depends in part on the terms of the settlement, the parties cannot assume that the court's class certification analysis would necessarily be the same if circumstances changed.

only consider some of these factors--namely those designed to protect absentees). Given that some of these factors cannot be fully assessed until the court conducts its fairness hearing, "a full fairness analysis is unnecessary at this stage . . . ." Reade-Alvarez v. Eltman, Eltman & Cooper, P.C., No. 04-2195, 2006 WL 1367414, at *7 (E.D.N.Y. May 18, 2006). Accordingly, the court will simply conduct a cursory review of the terms of the parties' settlement for the purpose of resolving any glaring deficiencies before ordering the parties to send the proposal to class members.

1. Terms of the Settlement Agreement

The key terms of the stipulation and settlement are as follows:

1. Class Definitions: the meal period class is defined as "All hourly employees employed by Circle K Stores, Inc. in the state of California from October 1, 2000 through the date the Court grants preliminary approval of this Settlement." The vacation class is defined as "All employees employed by Circle K Stores, Inc. in the state of California from March 3, 2000 through the date the Court grants preliminary approval of this Settlement who did not have all their accrued but unused vacation carried forward from year to year." The agreement excludes from the class employees of franchises who do/did not actually work for defendant Circle K Stores, Inc. (June 1, 2006 Jones Decl. Ex. A (Joint Stip. of Settlement & Release ¶ 6).)
2. Settlement Amount: Defendant agrees to a "total payout" settlement of five million dollars ($5,000,000). Of this

amount, three million eight hundred thousand dollars ($3,800,000) is allocated to the meal period class and one million two hundred thousand dollars ($1,200,000) is allocated to the vacation class. (Id. ¶ 16.)

3. Deductions: attorneys' fees (up to 30%), plaintiffs' costs (up to $25,000), "service payments" to the class representatives (up to $15,000 each), and claims administration costs (up to $150,000) will be deducted from defendant's total liability of $5,000,000. With the exception of the service payments, the meal period class will bear 76% of these costs and fees; the vacation class will bear the remainder. (Id. ¶ 15(d).)

4. Award Allocations: Meal period class members who file timely claims will receive a proportionate share of the $3,800,000 class settlement amount, minus costs, fees, and service payments. A member's share will be based on the number of weeks she worked for defendant during the class period and this number will be determined based on the total number of days worked divided by seven. (Id. ¶ 15(d)(i)(a).) The parties estimate that this approach will at a minimum yield an $8 per week payment for each class member, resulting in payments in excess of $2,600 for employees that worked throughout the entire class period. (P. & A. in Supp. of Mot. for Prelim. Approv. 8.) Vacation class members who file timely claims will likewise receive a proportionate share of the $1,200,000 class settlement amount, minus costs, fees, and service payments. After all claims are filed, the vacation class award will be divided by the

number of claimed vacation hours, yielding a per hour payment. (June 1, 2006 Jones Decl. Ex. A (Joint Stip. of Settlement & Release ¶ 15(d)(i)(b)).) The parties anticipate that this will result in at least a $13 per hour payment for employees who, on average, were making $7 per hour. (P. & A. in Supp. of Mot. for Prelim. Approv. 8-9.)

5. Claims Procedures: Members of each class will receive two forms sent out by the Claims Administrator, Rosenthal & Company LLC. (June 1, 2006 Jones Decl. Ex. A (Joint Stip. of Settlement & Release ¶¶ 15(d)(ix), 22(h)).) One will be a preprinted Class Claims Form that, based on defendant's records, will establish either the number of weeks worked (for meal period class members) or the number of vacation days owed (for vacation class members). (Id. ¶ 15(d)(ix)(a)-(b).) Class members will also receive a Request for Exclusion Form that will advise them on how to opt out of the class action settlement. (Id.) These forms will be sent, along with a notice announcement detailing the history of this litigation and further explaining the terms of the settlement, no more than twenty (20) days from the date of this order. (Id. ¶ 18(c).) Class members will have sixty (60) days from the date that notice is mailed to submit a claim and forty-five (45) days to request exclusion (in other words, to opt out). (June 1, 2006 Jones Decl. Ex. D (Proposed Notice).) Payments to class claimants will be mailed by the claims administrator within twenty (20) days of the final approval of the settlement. (June 1, 2006 Jones Decl. Ex. A (Joint Stip. of Settlement & Release ¶

20).)

6. Release: Class members who do not opt out of the class action, even if they do not file a claim, are forever barred from bringing claims for failure to provide meal or rest breaks from October 1, 2000 until this settlement is finally approved, and from bringing claims for failure to annually carry over accrued but unused vacation from March 3, 2000 until this settlement is finally approved. (June 1, 2006 Jones Decl. Ex. D (Proposed Notice).) The release does not cover employees who did not actually work for defendant, but rather worked for a franchisee. Additionally, the release does not apply to claims arising after December 2003 against ConocoPhillips (which sold defendant Circle K Stores, Inc. through a stock sale in December 2003 and absorbed some of defendant's existing employees through "migration"). (Id.; Apr. 7, 2006 Jones Decl. Ex. F (Prince Dep. 74:8-75:3).)

2. Preliminary Determination of Adequacy

Again, at this preliminary approval stage, the court need only "determine whether the proposed settlement is within the range of possible approval." Gautreaux v. Pierce, 690 F.2d 616, 621 n.3 (7th Cir. 1982) (quotation marks omitted). The court is really only concerned with "whether the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys . . . ." Tenuto v. Transworld Sys,, Inc., No. CIV. 99-4228, 2001 WL 1347235, at *1 (E.D. Pa. Oct. 31,

2001).

Accordingly, it is sufficient to note that the stipulation and settlement appear to be, for the most part, the result of vigorous, arms-length bargaining. Counsel for both parties have been actively engaged in this litigation for over two years and have diligently pursued the necessary discovery. Significantly though, despite having a factually well-developed case, both sides still face significant uncertainty because the claims (in particular the meal period class claim) encompass unsettled legal issues. These circumstances and attendant risks favor settlement. Hanlon, 150 F.3d at 1026.

Additionally, the terms of the settlement provide for significant recovery for class members[8] while at the same time offering a manageable approach to calculating awards. The proposed attorneys' fees, at no more than 30%, are also potentially within reason.[9] Likewise, the detailed notice proposed by the parties clearly explains to class members what their options are and is more than adequate. See Fed. R. Civ. P. 23(c)(2) (requiring only "the best notice practicable under the circumstances" "[f]or any class certified under Rule 23(b)(3)");

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[8] In particular, the settlement creates an opportunity for class members to file claims that might otherwise be time-barred.

[9] The stipulation recognizes that counsel must still submit an application for attorneys' fees, which it will do prior to the fairness hearing, and that the ultimate award will be determined by the court based on that application. Depending on the form of plaintiffs' counsel's application, the amount could be less than 30%. See Staton, 327 F.3d at 968 (discussing awards of attorneys' fees in the context of a pre-certification class action settlement and noting that "[t]his circuit has established 25% of the common fund as a benchmark award for attorney fees." (quoting Hanlon, 150 F.3d at 1029)).

Churchill Vill., L.L.C. v. Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004) ("Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" (quoting Mendoza v. Tucson Sch. Dist. No. 1, 623 F.2d 1338, 1352 (9th Cir. 1980))).

The only aspect of the settlement and notice that gives this court pause is the proposed "service payment" for the class representatives. In addition to the right to file claim forms, the settlement proposes a $15,000 "enhancement award" for each named plaintiff. The court recognizes that "a class representative is entitled to some compensation for the expense he or she incurred on behalf of the class lest individuals find insufficient inducement to lend their names and services to the class action." In re Oracle Secs. Litig., No. C-90-0931, 1994 WL 502054, at *1 (N.D. Cal. June 18, 1994) (citing In re Continental Ill. Secs. Litig., 962 F.2d 566, 571 (7th Cir. 1992)). "Such payments, however, must be reasonable in light of applicable circumstances, and not 'unfair' to other class members." Smith v. Tower Loan of Miss., Inc., 216 F.R.D. 338, 368 (S.D. Miss. 2003); see also In re Oracle Secs. Litig., 1994 WL 502054 at *1 (reducing requested payment of $2,500 to $500 for spending "between two and five hours undergoing depositions and . . . respond[ing] to a few narrow document discovery requests").

The proposed payment is not particularly unfair to other class members, given that it will not significantly reduce the amount of settlement funds available to the rest of the class. However, the court has no way of knowing whether the

payments are reasonable in light of applicable circumstances because plaintiffs have provided only general and largely conclusory statements about their involvement. They have failed to account for the number of hours spent on this case and have not described any personal sacrifices they made on behalf of the class. Cf. Nilsen v. York County, 382 F. Supp. 2d 206, 215 (D. Me. 2005) (awarding incentive payments of up to $6,500 to class representatives who "sacrificed their privacy to vindicate the privacy rights of the class members" by revealing in court documents and to the media that they had been subjected to illegal strip searches). Significantly, although Fagundes, who remains in defendant's employ, may have risked retaliation by her employer, the same cannot be said for West, who left Circle K in 2003.

Moreover, prior to settlement, both named plaintiffs declared that they "seek nothing for [themselves] in addition to the relief [they] seek on behalf of the class as a whole." (Mar. 20, 2006 Jones Decl. Ex. N (Fagundes Decl. ¶ 9), Ex. P (West Decl. ¶ 7).) This change in the relief sought by plaintiffs, and the fact that it is roughly six times the amount they would likely receive as ordinary class members pursuant to the terms of their own settlement, raises the specter that the named plaintiffs have been "bought out" to circumvent a more costly class action litigation. At the fairness hearing, based on detailed evidence of plaintiffs' involvement in this case, the court will determine what portion of this amount is actually

justified.[10]

In all other respects, the court preliminarily finds that the stipulation and terms of parties' settlement are acceptable.

IT IS THEREFORE ORDERED that plaintiffs' motion for preliminary approval of settlement be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that

(1) the following classes be provisionally certified for the purpose of settlement in accordance with the terms of the stipulation: (a) All hourly employees employed by Circle K Stores, Inc. in the state of California from October 1, 2000 through the date the Court grants preliminary approval of this Settlement; and (b) All employees employed by Circle K Stores, Inc. in the state of California from March 3, 2000 through the date the Court grants preliminary approval of this Settlement who did not have all their accrued but unused vacation carried forward from year to year.

(2) if the stipulation does not receive the court's final approval, should final approval be reversed on appeal, or should the stipulation otherwise fail to become effective for any reason (including any party's exercise of a right to terminate

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[10] The Ninth Circuit has warned district courts that "[i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness," and consequently "[t]he settlement must stand or fall in its entirety." Hanlon, 150 F.3d at 1026. However, because the terms of the stipulation and settlement contemplate a service payment of "not more than", or "up to", $15,000 per plaintiff "[s]ubject to [c]ourt approval", any modification of this award will be well within the terms of the agreement. (June 1, 2006 Jones Decl. Ex. A (Joint Stip. of Settlement & Release ¶¶ 15(d), (d)(xi)).)

under the stipulation), the court's grant of certification of the class shall be vacated and become null and void without further action or order of the court.

(3) the stipulation and the settlement provided therein are preliminarily approved as fair, reasonable, and adequate within the meaning of Federal Rule of Civil Procedure 23, subject to final consideration at the fairness hearing provided for below.

(4) for purposes of the stipulation and carrying out the terms of the settlement only:

a. Vicki West is appointed as the representative of the vacation class.

b. Wendy Fagundes is appointed as the representative of the meal period class.

c. the law firm of McInerney & Jones is appointed as lead counsel for the classes and shall be responsible for the acts and activities necessary or appropriate to present this stipulation and the proposed settlement to the court for approval and, if the settlement is finally approved, to implement the settlement in accordance with the terms of the stipulation and orders of the court.

(5) Rosenthal & Company LLC, 300 Bel Marin Keys Boulevard, Novato, California, is hereby approved and appointed as the Claims Administrator to carry out the duties of the Claims Administrator set forth in the stipulation.

(6) the form and content of the Notice of Settlement of Class Action (June 1, 2006 Jones Decl. Ex. D) is approved with the exception of section six, addressing scheduling matters

related to the Final Settlement Approval Hearing. These provisions are modified as provided below in order line eleven.

(7) the form and content of the Class Claim Form (June 1, 2006 Jones Decl. Ex. E) is approved.

(8) the form and content of the Request for Exclusion Form (June 1, 2006 Jones Decl. Ex. F) is approved.

(9) no later than thirty (30)[11] days from the date of this order, the Claims Administrator shall cause a copy of the Notice, the Claim Form, and the Exclusion Form to be mailed by first class mail to all class members who can be identified through reasonable effort from defendant's records. Defendant is hereby ordered and directed to provide the Claims Administrator with class member information pursuant to the terms of the stipulation.

(10) a hearing (the "Final Fairness Hearing") shall be held before this court on October 16, 2006 at 1:30 p.m. in Courtroom 5 to determine whether the proposed settlement, on the terms and conditions set forth in the stipulation, is fair, reasonable, and adequate and should be approved by the court; to determine whether a judgment as provided in the stipulation should be entered finally approving the settlement; and to consider class counsel's applications for attorneys' fees, reimbursement of costs, and service payments. The court may continue the Final Fairness Hearing without further notice to the

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[11] The terms of the parties' stipulation and settlement provide for twenty (20) days. However, at oral argument the parties requested that the court provide the Claims Administrator with thirty (30) days to prepare and send out the appropriate forms.

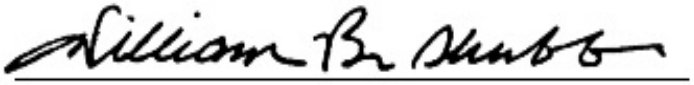
members of the class.

(11) any person who has standing to object to the terms of the proposed settlement may appear at the Final Fairness Hearing in person or by counsel, if an appearance is filed as hereinafter provided, and be heard to the extent allowed by the court in support of, or in opposition to, (1) the fairness, reasonableness, and adequacy of the proposed settlement; (2) the requested award of attorneys' fees, reimbursement of costs, and service payments to class representatives; and/or (3) the propriety of class certification. To be heard in opposition, a person must, within forty-five (45) calendar days after notice is mailed, (a) serve by hand or through the mails written notice of his, her, or its intention to appear, stating the name and case number of this litigation and each objection and the basis therefor, together with copies of any papers and briefs, upon class counsel and upon counsel for defendant, and (b) file said appearance, objections, papers and briefs with the court, together with proof of service of all such documents upon counsel for the parties. Responses to any such objections and class counsel's application for attorneys' fees, reimbursement of costs, and class representative service payments shall be served by hand or through the mails on the objectors (or on the objector's counsel if any there be) and filed with the Clerk of this Court no later than fourteen (14) calendar days before the Final Fairness Hearing. Objectors may file optional replies no later than one week before the Final Fairness Hearing in the same manner described above. Any settlement class member who does not make his, her, or its objection in the manner provided herein

shall be deemed to have waived such objection and shall forever be foreclosed from objecting to the fairness or adequacy of the proposed settlement as memorialized in the stipulation, the judgment entered, and the award of attorneys' fees, expenses, and service payments unless otherwise ordered by the court.

(12) pending final determination of whether the settlement should be finally approved, the court preliminarily enjoins all class members (unless and until the class member has submitted a timely and valid Request for Exclusion Form) from filing or prosecuting any claims, suits or administrative proceedings (including but not limited to claims with the California DLSE) regarding claims to be released by the settlement.

DATED: June 12, 2006



WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE